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IN THE

Supreme Court of the United States

October Term, 1981

No. ____

154 EAST PARK AVENUE CORP. and
SLC CONSTRUCTION CORP.,

Petitioners-Appellants,

—against—

THE CITY OF LONG BEACH and
ARTHUR ZIMMERMAN,

Respondents-Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

ELI KRAMER
Corporation Counsel of
the City of Long Beach
Attorney for
Respondents-Respondents
City Hall
1 West Chester Street
Long Beach, New York 11561
(516) 431-1000

QUESTIONS

1. Is there a substantial constitutional question involved?

2. Is a municipality responsible in damages where the Building Commissioner, acting in good faith and in his discretion, erroneously revokes a building permit?

3. Does the Supreme Court of the United States have jurisdiction of this matter which has been thoroughly litigated in the Courts of the State of New York and finally decided by the highest Court of the State of New York?

4. Did the Petitioners-Appellants apply within ninety (90) days for the relief sought in the subject Petition pursuant to Title 28 U.S.C.A. Section 2101, subdivision (c)?

TABLE OF CONTENTS

Page

Preliminary Statement 1

Statement of Facts 2

POINT I

THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION INVOLVED.....5

POINT II

A MUNICIPALITY IS NOT RESPONSIBLE IN DAMAGES WHERE THE BUILDING COMMISSIONER, ACTING IN GOOD FAITH AND IN HIS DISCRETION, ERRONEOUSLY REVOKES A BUILDING PERMIT.....7

POINT III

THE SUPREME COURT DOES NOT HAVE JURISDICTION OF THIS MATTER WHICH HAS BEEN THOROUGHLY LITIGATED IN THE COURTS OF THE STATE OF NEW YORK AND FINALLY DECIDED BY THE HIGHEST COURT OF THE STATE OF NEW YORK.....7

POINT IV

THE PETITIONERS-APPELLANTS DID NOT APPLY WITHIN NINETY (90) DAYS FOR THE RELIEF SOUGHT IN THE SUBJECT PETITION PURSUANT TO TITLE 28 U.S.C.A. SECTION 2101, SUBDIVISION (c) 8

TABLE OF CASES

Page

Jane Monell, et al., Petitioner v. *Department of Social Services of the City of New York,* 436 U.S. 658 5-6

George D. Owen, Petitioner v. *City of Indianapolis, Missouri, et al.,* 445 U.S. 624 6

Rottkamp v. *Young,* 21 A.D.2d 373, affirmed 15 N.Y.2d 831 7

PRELIMINARY STATEMENT

The Supreme Court of the United States should deny the Petitioners-Appellants a writ of certiorari on the grounds that there is no substantial constitutional question involved herein.

The sole allegation in petitioners-appellants' complaint, that refers to the Constitution of the United States, is made in paragraph 26, (page 43 of Petitioners-Appellants' Appendix). The said paragraph states:

> "That the refusal to allow reconstruction or rehabilitation of the premises on the color of local statutes is an illegal appropriation by the Respondent, City, of Petitioner owner's property without just and fair compensation, contrary to the laws and Constitution of the United States and the State of New York."

The Courts of the State of New York rejected this allegation *in toto.*

The Petitioners-Appellants never pleaded any violation of Title 42 U.S.C. 1983 in its pleadings and in spite of the fact that Petitioners-Appellants' Brief in the Court of Appeals contained numerous arguments that the Petitioners-Appellants were entitled to collect damages pursuant to said Section, the Court of Appeals held that the Petitioners-Appellants were not entitled to any damages. Even if the Petitioners did plead that the Respondents were liable for damages under 42 U.S.C. 1983, they could not and would not have sustained this contention.

It would appear that the Court of Appeals rendered its decision on February 17, 1981 and that Title 28 U.S.C.A., Section 2101 requires that an appeal to the Supreme Court be

taken or applied for within ninety (90) days after the entry of such judgment or decree. More than ninety (90) days having elapsed since the date of the decision appealed from, the present application must be rejected.

STATEMENT OF FACTS

Petitioner-Appellant, 154 EAST PARK AVENUE CORP., was the owner of certain premises located at 154 East Park Avenue, Long Beach, New York.

Prior to January 11, 1972, the within premises was a three story building occupied by a store on the ground or street floor and by apartments on the second and third floors. On January 11, 1972, the said premises were substantially damaged by fire.

On July 5, 1972, the Petitioner-Appellant, SLC CONSTRUCTION CORP., applied for and was issued a permit by the Long Beach Building Department to renovate and restore the premises to its non-conforming use.

On September 21, 1972, the Respondent-Respondent, CITY OF LONG BEACH, by its Building Commissioner, Arthur Zimmerman, revoked the said building permit on the grounds that the permit was issued in error in that the granting of the permit violated §9-108 of the Code of Ordinances of the City of Long Beach. Said Section states that:

> "Any non-conforming building damaged by fire or act of God to an extent not exceeding one-half its value or one-half its cubicle contents may be repaired within six months subject to the provisions of the building code and used as before."

The Building Commissioner, after reviewing the pertinent data including Fire Department reports and Building Department reports, concluded that the building was damaged by more than one-half of its value (market value).

The Petitioners-Appellants served a notice of motion on September 22, 1972, requesting a preliminary injunction forbidding the Respondents-Respondents from interfering with the continued construction of 154 East Park Avenue, Long Beach, New York, together with a summons and verified complaint seeking a permanent injunction enjoining the Respondents-Respondents from preventing the Petitioners-Appellants from reconstructing the subject premises in accordance with the building permit issued July 5, 1972. In addition, the complaint demanded monetary damages.

On or about November 11, 1972, the Respondents-Respondents served an answer on the Petitioners-Appellants.

On October 17, 1972, the motion for a preliminary injunction was denied by the Supreme Court, Nassau County. Mr. Justice Harnett, after a trial without jury, upheld the Respondents-Respondents' denial of the permit on the ground that the building was destroyed by more than 50%, and at the same time concluded that the actions of the Building Commissioner were performed in good faith. However, the Petitioners-Appellants were awarded $5,872.32 in consequential damages (B-15-20).

Both sides appealed to the Appellate Division, and the Appellate Division remanded the matter to Special Term for a hearing and determination as to whether the fire damage to the subject building exceeded more than one-half of its market value prior to the fire. In addition, the Appellate Division

reversed the award of consequential damages (B-5 & 6).

On remand, the matter was tried before the Honorable Robert C. Meade, Justice of the Supreme Court, Nassau County, who, after a trial without jury, concluded that the market value of the building prior to the fire was $25,000 and that based on the testimony of the second trial, the fire damage to the building did not exceed more than one-half of its market value prior to the fire (A-2-4).

On the first trial, Petitioners-Appellants' witnesses testified that the cost of restoring the building to its original use was in excess of $20,000. It is readily apparent that Mr. Justice Meade did not consider the testimony offered at the first trial, but solely that introduced at the second trial.

Petitioners-Appellants once again sought damages for the revocation of the building permit and Mr. Justice Meade conducted a hearing at which both sides presented oral argument and subsequently submitted briefs. Mr. Justice Meade determined that as a matter of law the Petitioners-Appellants were not entitled to recover damages (A-5 & 6).

Petitioners-Appellants appealed to the Appellate Division for a second time and once again the Appellate Division, in affirming Justice Meade's decision, held the Petitioners-Appellants were not entitled to damages.

Petitioners-Appellants thereafter appealed to the Court of Appeals and the Court of Appeals on February 17, 1981 unanimously affirmed the decision of the Appellate Division. The Petitioners-Appellants then moved for an order granting reargument, and upon reargument, sought an order remanding the matter for trial on the issue of damages. On

April 9, 1981, the Court of Appeals denied Petitioners-Appellants motion for reargument with costs and disbursements.

POINT I

THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION INVOLVED.

The sole allegation contained in Petitioners-Appellants' complaint which refers to the Constitution of the United States is a general statement contained in paragraph 26 of the complaint (page 43, Petitioners-Appellants' Appendix) that the Respondents-Respondents actions constitute a violation of the Constitution of the United States and of the State of New York. The Court of Appeals rejected this argument in affirming the Appellate Division's denial of damages. There is no substantial constitutional question which should be reviewed by the Supreme Court of the United States. There was no allegation contained in Petitioners-Appellants' complaint that the actions of the Respondents-Respondents constitutes a violation of Title 42 U.S.C. 1983. Even had the Petitioners-Appellants pleaded a violation of said Section, the Respondents-Respondents did not violate said Section despite the extension of liability enunciated by the various recent Supreme Court cases.

In the instant case, the Building Commissioner resolved a very difficult factual question after examining all of the applicable and pertinent data and concluded in good faith that the permit originally issued to the Petitioners-Appellants should be revoked. There was no illegal policy or custom involved, and there were no illegal ordinances or statutes involved. The Supreme Court in *Jane Monell, et al., Petitioner*

v. *Department of Social Services of the City of New York*, 436 U.S. 658, stated:

> "We conclude, therefore, that a local government may not be sued for any injuries inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its law makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an enemy is responsible under Section 1983."

In another fairly recent case entitled *George D. Owen, Petitioner* v. *City of Indianapolis, Missouri, et al.*, 445 U.S. 624, the Court reaffirmed the rationale of the *Monell* case by concluding:

> "The offending official, so long as he conducts himself in good faith may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom whether made by its law makers or by those whose edicts or acts may fairly be said to represent official policy'. (*Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658.)"

POINT II

A MUNICIPALITY IS NOT RESPONSIBLE IN DAMAGES WHERE THE BUILDING COMMISSIONER, ACTING IN GOOD FAITH AND IN HIS DISCRETION, ERRONEOUSLY REVOKES A BUILDING PERMIT.

The Court of Appeals in its decision, rendered February 17, 1981, concluded that the Respondents-Respondents are not responsible for the decision of its Building Commissioner, who acted in good faith and in a quasi judicial capacity. The Court reaffirmed its holdings in *Rottkamp* v. *Young*, 21 A.D.2d 373, affirmed, 15 N.Y.2d 831.

POINT III

THE SUPREME COURT DOES NOT HAVE JURISDICTION OF THIS MATTER WHICH HAS BEEN THOROUGHLY LITIGATED IN THE COURTS OF THE STATE OF NEW YORK AND FINALLY DECIDED BY THE HIGHEST COURT OF THE STATE OF NEW YORK.

POINT IV

THE PETITIONERS-APPELLANTS DID NOT APPLY WITHIN NINETY (90) DAYS FOR THE RELIEF SOUGHT IN THE SUBJECT PETITION PURSUANT TO TITLE 28, U.S.C.A. SECTION 2101, SUBDIVISION (c).

Section 2101 of Title 28 of the U.S.C.A., subdivision (c) states:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

The Court of Appeals rendered its decision affirming the decision of the Appellate Division denying Petitioners-Appellants' damages on February 17, 1981. More than ninety (90) days have elapsed since that date and the Petitioners-Appellants time to apply to the Supreme Court for a writ of certiorari has expired.

Dated: July 29, 1981

ELI KRAMER
Corporation Counsel of
the City of Long Beach
Attorney for
Respondents-Respondents
City Hall
1 West Chester Street
Long Beach, New York 11561
(516) 431-1000